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No. 81-2363

In the Supreme Court of the United States

OCTOBER TERM, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners

v.

TERRI LEE HALDERMAN, et al.,
Respondents

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Insofar as respondents' briefs address the merits of petitioners' arguments, those points are fully discussed in the petition. Accordingly, petitioners will reply here only to the following technical arguments raised by respondents Halderman, et al.:

1. Although recognizing that petitioners have paid $1.2 million in contempt fines, none of which will be returned absent a decision by this Court, respondents Halderman, et al., argue that this case is somehow moot. That argument has three alternative grounds, each of which is equally frivolous.

First, respondents contend that the "statute upon which petitioners rely no longer is in effect" and that, because of that intervening event, this case is moot. This argument ignores entirely the continuing harm to petitioners —the loss of $1.2 million and a finding of contempt. Respondents do not suggest any intervening event which would allow respondents to recover that money. Thus, their loss is continuous and this case, like any case involving money damages, is not moot.

Respondents' second argument in support of mootness is that petitioners were purged of contempt. Once again, respondent does not suggest that that purging entitles petitioners to recover their money and, therefore, does not address the continuing harm which forms the basis of the controversy in this case.

Finally, respondents apparently argue that this case is moot because the fund created by the contempt payments will be exhausted before this Court can act.[1] That argument assumes, in essence, that this Court is without power to remedy the improper collection of money by a lower court unless that money is maintained in a separate account pending a decision by this Court. That assumption, made without citation, is absurd. Dollars are fungible and, certainly, fines improperly collected by a federal court can and should be ordered repaid from any one of the many funds available to that court.

2. Respondents Halderman, et al., also contend that the question presented to this Court for decision was not

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[1] This argument is based on district court orders, issued on a regular basis transferring money from the contempt fund to finance its two masters. In January of 1982, the district court also issued an order transferring moneys from that fund to pay respondents' attorneys over $60,000 in fees for hours spent on the contempt proceedings. Contrary to respondents' contention, it is unlikely the fund will be exhausted within the next term of this Court since the district court is planning to dissolve one of the masters' offices being financed from that fund. In any case the $60,000 paid to respondents' attorneys is clearly recoverable.

Moreover, petitioners have taken all reasonable steps to preserve the fund. Specifically, petitioners asked the district court to modify its first transfer orders to require the posting of bond in order to preserve their ability to recover the money should they prevail on appeal. When the district court failed to act on that motion or require bond as a condition to subsequent transfers from the funds, petitioners appealed each subsequent transfer order. These appeals are presently pending in the Court of Appeals. Certainly, in light of these efforts, petitioners should not be deprived of their remedy, let alone their hearing in this court, by the continuing improper actions of the respondents and the lower court.

decided by the courts below.[2] In so doing, respondents simply mischaracterize the question presented to this Court.[3]

This case raises two issues: (1) whether state officials may raise their inability to comply with a federal court order because of a lack of money as a defense to contempt rather than by a Rule 60 motion to amend the order and (2) if so, whether such an inability existed in this case. The first issue was clearly decided by the Court of Appeals and is properly raised by petitioners before this Court. Because of its decision on the first issue, the Court of Appeals did not reach the second.[4] That failure does not, however, present an absolute bar to this Court's considering that issue. See *Dandridge v. Williams*, 397 U.S. 471, 475-76, n. 6 (1970). It is, therefore, properly subsumed within the question presented for this Court's consideration.

3. Finally, respondents Halderman, et al., attempt to distinguish this case from one in which Pennsylvania's Commonwealth Court recognized that state officials cannot spend money they don't have, even to comply with federal court orders. *Burd v. Commonwealth*, 443 A.2d 1197, 1199 (Pa. Commonwealth Ct. 1982). There is no distinc-

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[2] Respondent suggests that petitioners are now required to file a Rule 60 motion with the district court in order properly to raise the "impossibility" issue in the lower courts. That contention totally misses the point since such a motion would under no circumstances result in a return of the moneys paid to court for contempt.

[3] Nonetheless they go on to address the merits of the question actually presented.

[4] Ironically, the District Court ruled on the second issue, but did not consider the first, because no respondent raised it.

tion. Here, as in *Burd*, there was an express legislative prohibition on the expenditure of state funds for a certain purpose—in *Burd*, an auto-emissions program; here, the court appointed masters. In neither case did the legislature attempt to prohibit the payment of state moneys for contempt fines. However questionable that legislative judgment may have been, it was binding on petitioners herein and disabled them from complying with the district court order to pay for the masters. That impossibility was properly raised as a defense to contempt and should have been considered by the lower courts.

CONCLUSION

For the foregoing reasons, and for those set forth in this petition, petitioners respectfully request that this Court issue a writ of certiorari in this case.

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